HON'BLE SRI JUSTICE P.S. NARAYANA

W.P.No.2319 of 2006

Date : 26-10-2007

Between :

M/s.Noble Upper Primary High
School, Nizamabad,
Represented by its Secretary
and Correspondent .. Petitioner

and

The Assistant Provident Fund
Commissioner, Employees Provident Fund
Organisation, Sub-Regional Office,
Nyalkal Road,
Nizamabad-503001, A.P. .. Respondent

HON'BLE SRI JUSTICE P.S. NARAYANA

W.P.No.2319 of 2006

ORDER:

1. Heard the Counsel.

2. The learned Counsel for the writ petitioner had taken this Court through the contents of the affidavit filed in support of the Writ Petition and also the grounds raised in this regard. The Counsel also placed strong reliance on **Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers' Union, Delhi [1], M/s.Ebrahim Currim & Sons Vs. The Regional Provident Fund Commissioner, Maharashtra and Goa and another [2].** The learned Counsel would submit that though an order of remand was made, opportunity was not given to advance all the contentions and hence serious prejudice is caused to the petitioner.

3. On the contrary Sri R.N.Reddy, the learned Counsel representing the respondents would maintain that though concurrent findings had been recorded both by the Primary Authority and also the Appellate Authority for the limited purpose the matter was remitted. The learned Counsel also would maintain that before the Primary Authority the applicability of the Act had not been raised and further several adjournments had been given, but however, the opportunity given had not been availed by the writ petitioner. Hence, now the writ petitioner cannot be permitted to raise all such grounds before the Primary Authority.

4. The Apex Court in the decision referred (1) supra while dealing with the test of functional integrality observed at para-5 :

"In Associated Cement Co. Ltd. Vs. Their Workmen,

AIR 1960 S.C. 56, this Court had to consider the question whether the employer's defence to a claim for lay-off compensation by the workers of the Chaibasa Cement Works that the laying off was due to a strike in another part of the establishment viz., limestone quarry at Rajanka was good. In other words, the question was whether the limestone quarry of Rajanka formed part of the establishment known as Chaibasa Cement Works within the meaning of Section 25E(iii) of the Industrial Disputes Act. While pointing out that it was impossible to lay down any one test as an absolute and invariable test for all cases it observed that the real purpose of these tests would be to find out the true relation between the parts, branches, units etc. This Court however mentioned certain tests which might be useful in deciding whether two units form part of the same establishment. Unity of ownership, unity of management and control, unity of finance and unity of labour, unity of employment and unity of functional "integrality" were the tests which the Court applied in that case. It is obvious there is an essential difference between the question whether the two units form part of one establishment for the purposes of Section 25E(iii) and the question whether they form part of one single industry for the purposes of calculation of surplus profits for distribution of bonus to workmen in one of the units. Some assistance can still nevertheless be obtained from the enumeration of the tests in that case. Of all these tests the most important appears to us to be that of functional "integrality" and the question of unity of finance and employment and of labour. Unity of ownership exists ex hypothesi. Where two units belong to a proprietor there is almost always likelihood also of unity of management. In all such cases therefore the Court has to consider with care how far there is "functional integrality" meaning thereby such functional interdependence that one unit cannot exist conveniently and reasonably without the other and on the further question whether in matters of finance and employment the employer has actually kept the two units distinct or integrated".

In the decision referred (2) supra, the learned Judge of Bombay

High Court observed :

> "Mere fact of common ownership by itself is not sufficient to satisfy the test of functional integrality. Similarly mere fact of supply of raw materials or purchase of raw materials for the factory by the first unit or sale of the finished goods by the first unit would not be sufficient to satisfy the test of functional integrality. All the relevant tests must be considered and applied before deciding the issue as to applicability of S.2A or of functional integrality between the two units. The predominant test is as to whether the subsequent unit could survive on closure of the first unit or whether the subsequent unit was merely a branch or department of the first unit."

It is stated by Sri R.N.Reddy, the learned Standing Counsel representing the respondents that these decisions are not applicable to the facts of the case.

5. The Writ Petition is filed for a writ of certiorari or any other appropriate writ or direction to the respondent, quashing the order contained in A.T.A.No.334(1)/2001 dated 6-10-2005 of the Employees Provident Appellate Tribunal, New Delhi read with order No.AP/19609/SRO/NZB/7B/2001-02/2183 dated 12-4-2001 of the Assistant Provident Fund Commissioner, Nizamabad and to pass such other suitable orders.

6. It is stated in the affidavit filed in support of the Writ Petition that the petitioner-Institution is being run by a Committee by name M/s.Noble Educational Committee, Phulong, Nizamabad, Andhra Pradesh, under the name and style M/s.Noble Upper Primary & High School, Nizamabad. There are two Institutions viz., Noble Upper Primary School, Urdu Medium, Phulong, Nizamabad and M/s.Noble High School, English Medium, Barkatpura, Nizamabad. Both the Schools are recognized Schools by the Government of Andhra Pradesh and the recognition of both the schools are also separate. The Urdu Medium School was started initially with

two Teachers and one Head Master only. Gradually, the staff was increased year by year and the said school continued as Primary School upto the year 1975 with seven Teachers, one Head Master, one Ayah and one Peon and it was upgraded to Upper Primary School in the year 1977 as Noble Upper Primary School. In the yr 1978, the school became fully Aided School by the Government as Upper Primary School for thirteen Teachers. There is no increase in the strength of Teachers and staff thereafter till date. Later on, the Committee decided to open a separate independent school with medium of instructions in English and that English medium school was established in the year 1980. Initially, the said English medium school was a Primary School for L.K.G. & U.K.G. only with location at Barkatpura, Nizamabad. It started functioning with two Teachers and one Head Master only upto the year 1985. It became Upper Primary School in the year 1985 and continued as Upper Primary School till 1992 and thereafter it became a full-fledged High School English medium from 1992 onwards and it is running with the following staff:

Teachers.....	11
Attenders	1
Ayay	1
Head Master	1
Total	14

Both the Schools are being run by M/s. Noble Education Committee, Nizamabad. They are absolutely independent of each other and they are being managed under different Head Masters and staff. The accounts of the said Schools are maintained separately altogether. M/s. Noble Upper Primary School, Urdu Medium is located at Phulong, Nizamabad which is completely Aided School by the Government of Andhra

Pradesh whereas M/s. Noble High School, English Medium is a different School located at Barkatpura, Nizamabad which is unaided and it is a different entity altogether. The recognitions of the above two Schools are different. It is also further stated that there is a Minority Welfare Society at Nizamabad. Differences arose with them on account of admissions of the students in the Schools. Since the petitioner did not accept their proposals for admission of the students in the Schools, they lodged a false complaint stating that the said Schools are employing more than 20 employees. The respondent visited the Schools and inspected the records but he could not detect twenty employees in each school. Then he arranged a squad for surprise visit but they could not find twenty employees or more in any of the two schools. Ultimately they combined both the schools together as one entity and covered them under the Provident Fund Act. Under the threat of prosecution and dire consequences, they collected Rs.12,446/- forcibly from the petitioner. The protests of the Committee were not at all taken note of and covered the Schools under the Act combined together. The order of coverage under Section 7A of the Act dated 18-11-1999 made on the basis of the squad inspection report dated 4-11-1999 stated to have been passed by the respondent was also not communicated to the petitioner so far. It is also further stated that the coverage of the schools under the Act was therefore arbitrary, illegal and unconstitutional. The review petition filed by the petitioner was also rejected by the respondent vide No.AP/SRO/NZB/Z-1/19609/7-B/Review/2001/225/1328 dated 14-5-2001. It is also further stated that the question of unity of two different establishments has to be determined on the touchstone of its total functional integrity. The Apex Court had laid down certain tests to determine functional integrity and it should be seen as to

whether the second unit would survive in the absence of the first or when the first unit was closed whether the second unit would continue to do its activities. The mere fact of common ownership by itself is not at all sufficient to satisfy the test of functional integrity. The Bombay High Court had also followed the same principle and rejected the plea of Regional Provident Fund Commissioner, Maharashtra and Goa in the decisions referred (1) and (2) referred supra. The said decisions were cited by the petitioner's Counsel before the Appellate Tribunal at the time of arguments, but they are not totally ignored by the Appellate Tribunal and the impugned order is passed which is arbitrary, illegal and unconstitutional and it is liable to be quashed by this Court. It is also stated that pending disposal of the Appeal before the Appellate Tribunal, New Delhi, there was a threat of recovery by the respondent upon which the petitioner moved W.P.No.5761/2003 and this Court was pleased to stay any further proceedings pending final disposal of the Appeal under the condition that the petitioner shall deposit half of the demanded amount within three months from the date of the order dated 14-4-2003 upon which the petitioner complied with the direction and the matter was stayed. It is also stated that no Second Appeal is provided under the Act and the writ petitioner is left with no other option except to approach this Court under Article 226 of the Constitution of India.

7. The operative portion of the order impugned reads as hereunder:

> "So far as determination of P.F. dues is concerned, I am of the view that the matter has to be remanded back for affording an opportunity to the appellant to provide correct strength of employees working in both the schools to the respondent together with the wages received by them. Dues have been determined on the actual basis. The amount of Rs2,12,793/- which was remitted by the appellant with the Registrar of this

Tribunal be sent to the respondent and same shall remain lying with the respondent and will be given adjustment of after the re-assessment is done. Appeal is disposed of in the above terms. Appeal file be consigned to record room and copy of this order be sent to both the parties. Appellant shall appear before the respondent on 30.11.2005 and on subsequent dates which may be fixed during the enquiry and shall produce records including the details of wages paid to employees."

8. As can be seen from the remand order, it appears to be a limited remand order. Further, in the light of the respective contentions advanced by the parties, let the Primary Authority consider all the objections. However, it is brought to the notice of the Court that though the Primary Authority had given several adjournments, the writ petitioner is not producing the relevant records and there is total non-cooperation. It is made clear that the Primary Authority is at liberty to fix a date for production of records and decide the matter without granting any adjournment and in default of the writ petitioner attending before the Primary Authority on such notice, the Primary Authority is at liberty to pass appropriate orders.

9. Thus, the Writ Petition is disposed of with the above directions. No costs.

_____

Justice P.S. Narayana

Date : 26-10-2007

AM

---

[1] **AIR 1960 S.C. 1213**

[2] **1993 L& IC 1740 (Bombay)**